UNITED STATES
v.
FANNIE E. LEWIS TRUSSEL

IBLA 71-200 Decided September 11, 1972

Appeal from decision of hearing examiner Rudolph M. Steiner in proceedings Nos. PL-72-19 and PL-72-20 holding appellant's mining claims subject to section 4 of the Surface Resources Act of July 23, 1955.

Affirmed.

Mining Claims: Surface Uses -- Surface Resources Act: Generally

In a proceeding under section 5 of the Surface Resources Act of July 23, 1955, to determine the rights of the Government and a mining claimant as to the use and management of the surface and its resources on certain gold mining claims, the issue is whether or not there is presently disclosed within the boundaries of each claim valuable minerals of sufficient quantity, quality, and value to constitute a discovery, and evidence to establish that the discovery was made prior to the effective date of the Act. 30 U.S.C. § 613.

Mining Claims: Surface Uses -- Surface Resources Act: Generally

Under section 5 of the Surface Resources Act of July 23, 1955, the effect of a decision that no mineral discovery has been shown is to permit the Government to manage and dispose of the vegetative and other surface resources without disturbing claimant's right to develop his gold mining claim by using the subsurface and surface to the extent necessary to conduct his mining operations. 30 U.S.C. § 613.

Administrative Procedure: Hearings -- Surface Resources Act: Hearings

New evidence submitted subsequent to a hearing held pursuant to a Surface Resources Act proceeding cannot be considered in deciding the case on the merits but can only be considered to determine whether a further hearing is warranted. 30 U.S.C. § 613.

APPEARANCES: Fannie E. Lewis Trussel, pro se; Charles F. Lawrence, Esq., Office of the General Counsel, Department of Agriculture, for the United States.

OPINION BY MR. GOSS

Fannie E. Lewis Trussel 1/ has appealed from a decision dated January 21, 1971, whereby a Departmental hearing examiner declared appellant's gold mining claims 2/ subject to the limitations and restrictions of section 4 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612 (1970).

At the request of the United States Forest Service, a proceeding pursuant to section 5 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 613 (1970), was initiated. The purpose of the proceeding was to determine the right of the Trussels, asserted in their verified statements, to use and dispose of the vegetative and other surface resources embraced within the boundaries of their gold mining claims. A hearing was held on October 2, 1969, February 24, 1970, and June 1 and 2, 1970. The notice of hearing indicated two issues upon which evidence would be offered by the Government to prove that:

(1) There is not disclosed within the boundaries of the mining claims mineral material of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

(2) The claimants have no valid or effective right, title or interest in or under such mining claims contrary to or in conflict with the limitations and restrictions specified in section 4 (30 U.S.C. § 612) of the Act of July 23, 1955.

1/ At the time the verified statements were filed pursuant to section 5 of the Act Fannie E. Lewis Trussel, her husband, Ulric L. Trussel and his brother, Edward E. Trussel, were joint tenants of the mining claims. Prior to the hearing, Edward Trussel died; on July 15, 1971, Ulric Trussel also died.

2/ There are thirteen mining claims involved in this appeal. They are Premium Nos. 2, 3, 4 and 5, Premier Nos. 1, 2, 3, 4, 5, and 6, Premier No. 6 Placer, Crysolite, and Mt. Hough. Appellant has three other claims (San Francisco, Los Angeles, and Premium) which were patented on December 26, 1956. All are situated in Secs. 29 and 32, T. 26 N., R. 10 E., M.D.M., Plumas County, California.

In her statement of reasons filed in support of her appeal appellant makes reference to:

1) A letter to Ulric Trussel from Charles L. Gilmore dated June 3, 1952.

2) Assay reports of Miles D. Rombough, mining engineer, Rombough Laboratories.

3) Assay records of samples taken by Fletcher Walker, mining engineer.

4) A list of mining engineers who had examined and recommended the mining claims.

These items, not being a part of the evidence submitted at the hearing, cannot be weighed as evidence in determining the merits of this appeal. They may only be examined to ascertain if there is sufficient basis to warrant a further hearing. See 43 CFR 4.24; United States v. Rodney Wood et al., A-30697 (May 31, 1967). All the items were apparently known to appellant at the time of the hearing and therefore cannot constitute newly discovered evidence. Richardson v. Davis, 439 P.2d 949 (Okl. 1968). Appellant has made no showing that a further hearing would adduce evidence to disclose an existing valid discovery on any specific claim. However, appellant is not precluded from introducing the information as evidence in any subsequent proceeding affecting the claims.

After reviewing the record and the applicable law, we agree with the hearing examiner's decision and hereby adopt his decision which is attached hereto. There was no discovery proved as to any specific claim. It would, however, be helpful to explain the effect of the decision on appellant's mining claims, as it appears that appellant does not fully understand the hearing examiner's decision.

One of the reasons the Surface Resources Act was passed by Congress was to eliminate some of the abuses that were occurring under the mining laws whereby mining claims were being located primarily for the available timber or as business or recreational sites. See Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969). Section 4 of the Act, 30 U.S.C. § 612 (1970), reserved to the United States Government the right to manage and dispose of the vegetative surface resources and to manage other surface resources (except mining deposits subject to location under the mining laws of the United States) of claims located after the effective date of the Act.

Section 5, 30 U.S.C. § 613 (1970), established the procedure whereby the United States Government could have a determination made as to the respective rights of the United States and the claimants as to surface resources of claims located prior to the Act. The principal effect of a section 5 proceeding is the limitation prior to patent as to the management and disposition of vegetative surface resources and management of other surface resources. Appellant may proceed to develop her claims, and she remains entitled to all subsurface rights she had prior to such a proceeding; she is also entitled to those surface resources reasonably necessary for conducting her mining operations. Arthur L. Rankin, 73 I.D. 305, 311 (1966).

Appellant is troubled by the fact that discovery is the critical issue in a section 5 proceeding and in a proceeding to contest the validity of a mining claim. The issue in a section 5 proceeding was discussed in United States v. Clarence E. Payne, 68 I.D. 250, 253 (1961):

> * * * [T]o establish any right to the surface resources, a mineral claimant must prove that he has made a discovery within the meaning of the mining laws. Conversely, before it can be determined under the act of July 23, 1955, that the holder of a mining claim located before the date of the act does not have any right to the surface resources, it must be proved that he had not prior to the date of the act made a valid discovery within the meaning of the mining laws.

In a proceeding to determine the validity of a claim, if a mining claimant does not produce evidence of a discovery, his claim may be determined to be invalid. Such a result does not follow from a section 5 proceeding for Congress has by statute provided that there is no determination as to the ultimate validity of the claim. The effect of a section 5 proceeding on a subsequent Departmental action was discussed in Arthur L. Rankin, supra, at 313:

> We must conclude, therefore, that the Bureau erred insofar as it assumed and held that the finding of a lack of discovery in proceedings under section 5 of the Surface Resources Act precludes a mining claimant from asserting rights to leasable minerals, or otherwise subjects the claim to restrictions or limitations not specifically provided for by that act. This conclusion, however, does not mean that the proceedings under that act must be ignored or discounted. The record established at such a hearing becomes part of the official

> records of this Department. Therefore, it may well serve to provide a basis for further action against a claim, and, in any subsequent hearing, the transcript of testimony and exhibits, with the decision may be introduced as evidence of the facts to be proved. Of course, evidence to rebut such evidence would have to be considered if presented at the subsequent hearing.

Appellant has requested that patent issue as to the remaining unpatented mining claims embraced by Mineral Survey 6317: Premier No. 1, Premier No. 2, Premier No. 4, and the Crysolite. The decision herein is not meant to decide whether or not appellant's claims ultimately will be patentable. If appellant desires to patent her remaining lode claims she must follow the procedure set forth in 30 U.S.C. § 29 (1970) and 43 CFR Part 3860 (1972) and show that at the time she applies for a patent a valuable mineral deposit exists within the limits of each claim on which application is made. United States v. Lem A. and Elizabeth D. Houston, 66 I.D. 161, 164 (1959).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Joseph W. Goss
Member

We concur:

Douglas E. Henriques
Member

Edward W. Stuebing
Member